FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Introductory Statement.

This is a case of statutory construction. The statutes are clear and the legislative history documented.

Respondents, and their supporting amici, ask the Court to make a policy determination contrary to the blend of policy determinations made by the Congress and expressed by the statute. In so doing, they also

seek to have the Court reverse its own recent determinations to enforce the statute as written and adopt a policy they would set.

They seek to extend federal regulation to local government pension systems. They seek to mandate preferential treatment for females in all retirement plans. The latter is contrary to what this Honorable Court said in *General Electric Co. v. Gilbert* 429 U.S. 125, 139 fn. 17, 97 S.Ct. 401, 410 fn. 17, 50 L.Ed.2d 343, 356 fn. 17 (1976) that Title VII does *not* require greater economic benefit be so paid.

The Department's salary schedule establishes the same gross salaries for males and females. If such were paid and they were left to purchase their own annuities the females would have to spend more to buy the same size periodic annuity as the males, because of their longer life expectancy. Instead, the Department, in the present case provided a pension benefit system and withheld a larger contribution from the salary schedule of females than from males. The Department also contributed more towards the female's annuity than to the male's. The respondents wish to mandate a system where either all males will have to subsidize all females or all employers will have to pay more to females to support their annuities than to males. Under this system females will never have to pay the true proportionate cost of their annuities as compared to males. The law does not require this.

Further, the statutes do not extend to the regulation of pension benefits *per se*, or to standards of compensation set by local governmental entities.

Summary of Argument.

1. A differential rate of payment based on sex does not violate Title VII and the Equal Pay Act where another factor such as a pension system is the basis for the rate of payment and such is not a subterfuge. Plaintiffs (respondents) have the burden of proving that the rate of payment is not based on a factor other than sex and petitioners do not need to justify the differential. Respondents here claim, as a matter of federal law, a right to compensation greater than the amount paid to males.

2. Legislative history since enactment of Equal Pay Act demonstrates that Congress intended not to prohibit sex differentiation in compensation or in retirement plans rationally based. Legislative history also demonstrates an intent not to regulate local government pension systems.

3. The adoption of the Administrative Procedure Act after the *Skidmore v. Swift* decision, and the repeated decisions of Congress not to grant the administrative agencies herein any rule-making authority or jurisdiction under either the Equal Pay Act or Title VII precludes giving effect to "guidelines" against petitioners. With respect to local governmental entities, the "public interest" is represented not by EEOC, but by the Attorney General, and the pronouncements of EEOC may not be given any effect against petitioners either on questions of law or on questions of fact, but petitioners are entitled to *de novo* determinations in Article III courts.

4. Congress may not act to enforce Fourteenth Amendment except within the limits of the Fourteenth Amendment, *i.e.* on a rational basis standard. If Con-

gress had acted outside that power to regulate a local government's pension plan, its action would violate the Tenth Amendment.

5. The respondents have failed to show any sound reason why the Court should reverse its decisions in *General Electric Corp. v. Gilbert,* or *Nashville Gas Co. v. Satty.* If there is a rational basis for the Court to take a position favoring females in pension plans as respondents urge, then there is an equally rational basis for upholding systems which, on an actuarial (*i.e.* rational) basis treat the sexes equally. That being the case, your petitioners did not violate Title VII or the Equal Pay Act.

I

SETTING SALARY OR COMPENSATION STANDARDS WITH RESPECT TO SEX IS NOT A VIOLATION UNDER TITLE VII UNLESS IT IS A SUBTERFUGE TO AVOID THE PROHIBITION OF THE EQUAL PAY ACT.

1. Setting a Compensation Standard Based on Sex Does Not Violate Title VII.

Congress did not intend to prohibit the setting of compensation standards based on sex under Title VII. It only intended to prohibit different wage rates payments which violated the Equal Pay Act.

Congress has always been well aware that the very essence of every employment decision (setting salary standards, job classifications, hiring, firing, etc.) necessarily involves "discrimination" in the *proper* sense of that word.

The setting of personnel and salary standards is like the legislative function in government. Laws classify and so discriminate. The application of employment

standards in individual cases is like the judicial function. Judgments discriminate between cases within and those outside the statutory standard. *Cf. Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 97 S.Ct. ...., 50 L.Ed.2d 450 (1977).

The setting of *any* standard necessarily involves a generalization which cannot (in the absence of omniscience) be perfect in formulation or universally fair in application. Accordingly, application of any standard may adversely affect some individual in some respect, *Kahn v. Shevin,* 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed. 2d 189 (1974); *Schlesinger v. Ballard,* 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Trans World Airlines v. Hardison,* .... U.S. .... 45 L.W. 4672 (June 16, 1977).

Every title of the 1964 Civil Rights Act was directed to the setting of standards and to the application of those standards in a particular context. For example Title I was directed to voting standards and their application; Title VII, to setting standards and their application in the employment context.

From the outset, Title VII separately addressed the setting of standards (§703(a)(2)) and the application of those standards in individual cases (§703(a)(1)).

The decisions of this Court impliedly recognize the distinction between the subsections. When the classification or standard is *bona fide,* the plaintiff (or plaintiffs) are not entitled to relief under § 703 (a)(2). On the other hand, when the application of such standard is *bona fide,* then the plaintiff (or plaintiffs[1]) are

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[1]Plaintiffs may be a "procedural class" for judicial class action purposes; but they are not a "substantive" class established and protected as a "substantive" or "protected class" by a statute of Congress.

not entitled to relief under § 703(a)(1). See *General Electric Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); *Nashville Gas Co. v. Satty,* .... U.S. ...., 33 Lab. Law Rep., CCH, Dec. 8, 1977.

The statute in light of its legislative history shows that Congress did not intend Title VII to regulate the amount of compensation paid to the sexes.

The House Bill as amended prohibited failing to hire because of sex (§703(a)(1)) and setting standards adversely affecting employment opportunity because of sex (§703(a)(2)). But, the remedies section of the House Bill allowed judicial remedies only in case of "discrimination on account of race, color, religion or national origin."

The legislative history of the House makes clear that the reason for the seeming omission of "sex" in the remedies section, was that "sex" was added to the other sections *only* to ensure that the *practical* impact of the statute among women in the labor market would be color-blind. The House did not intend to expand governmental action regarding "sex" beyond the provisions of the Equal Pay Act. (See Opening Brief App. C5-6.)

The Senate, like the House, intended *not* to expand governmental action regarding sex beyond the prohibitions of the Equal Pay Act.

Thus, the Dirksen-Humphrey substitute bill included three major statements of legislative policy all contained in Section 703(h).

The first was the express statutory exclusions of good faith merit system, good faith seniority system, etc. These were taken from the already enacted Equal Pay Act. Such were clearly intended to have the

same meaning in the later statutes as was intended by the earlier Act. The statute was not intended to regulate the setting of employment or salary standards or the application of such standards. That was to be, as always, the employer's prerogative. The bill was not intended to establish a corporate state.

Moreover, as it was under the Equal Pay Act, classifications based on sex, such as "male packagers/female packagers" were *not* prohibited by Title VII. (109 Cong. Rec. 9196, 9209.) By this addition the bona fide occupational qualification provision previously added in the House thereby became simply a specific application of this broader provision permitting work classifications based on sex, *e.g.,* "male/female packagers," "policemen/policewomen." *Cf. Blake v. City of Los Angeles,* 435 F.Supp. 55 (C.D. Cal. 1977) on appeal to Ninth Circuit; *Dothard v. Rawlinson* .... U.S. ...., 97 S.Ct. 2720 (1977).

The second policy was that "good faith merit system" provisions were also intended to cover the "written test" problem, as the legislative history clearly shows. (110 Cong. Rec. 13504.) The Tower Amendment on testing was subsequently added as the second clause of Section 703(h), simply reiterating the broader exemption of good faith merit system already stated by Section 703(h).

These provisions establish that employment decisions and actions taken pursuant to a good faith system are valid unless there is an *intention* to discriminate.

Thus any system can be expected to impact some individual unfairly in some respect. Thus, where the classification is rational or bona fide, an unlawful practice does not exist merely because someone claims

to have been unfairly impacted by the system. *International Brotherhood of Teamsters v. United States,* .... U.S. ...., 52 L.Ed.2d 396, 97 S.Ct. ...., 45 L.W. 4506 (1977); *Trans World Airlines v. Hardison, supra.*

Conversely where the classification is *not* pursuant to a good faith merit system of classification and testing and unfairly impacts an individual a different rule applies. *Griggs v. Duke Power,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

The third policy statement of Section 703(h) was expressed by the Bennett Amendment.

The Bennett Amendment is the third and last clause of Section 703(h). It is an absolute exclusion from the provisions of Title VII. It expressly allows intentional discrimination between the sexes; to differentiate upon the basis of sex in determining the amount of compensation or wages paid or to be paid, is by nature an intentional act. But an unlawful discrimination between the sexes does not occur unless the Equal Pay Act is violated by the rate of wage payments made.

As this Court has held with respect to the other clauses of §703(h):

> "Section 703(h) 'is a definitional provision; as with other provisions of §703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not.' "
>
> *Trans World Airlines Inc. v. Hardison, supra,* at 45 L.W. 4677.

Thus under Section 703(h) the *amount* of compensation may differ based on sex but no unlawful employment practice is therefore shown *prima facie* under

Title VII, since it expressly states it is not an unlawful employment practice to differentiate upon the basis of sex in determining the *amount* of compensation or wages paid or to be paid unless prohibited by Title 29, §206(d), the Equal Pay Act. (*General Electric Company v. Gilbert, supra; Nashville Gas Company v. Satty, supra; EEOC v. Colby College,* USDC [SD Maine, Civ. No. 75-136-SD][2]; *International Union Electrical Radio & Machine Workers v. Westinghouse Electric,* USDC N.D. W.Va., Civ. No. 75-62-F(4)).

2. There Is No Duty to "Justify" Differential Amount Since No Improper Discrimination Has Been Shown.

The statute does not purport to regulate the *amount* of compensation or salary standards as such. It also does not purport to regulate differentiation upon the basis of sex, as such.

The Government argues that if the *amount* paid or to be paid differs, then this is an "effect" which the defendant must "justify" under Title VII. It argues that the Pension Plan is a "system" of deferred compensation and should be treated as subject to the jurisdiction of Title VII and prima facie unlawful because it has differential "effects."

We again point out that the Executive Branch proposed to Congress in 1972 that Congress adopt and allow expansion into the area of economic control upon grounds of a new definition of "discrimination" in terms of "systems" or effects". (Pet. Op. Br. p. C-24). Congress rejected that proposal. Congress reaf-

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[2]See Appendix B to amicus brief submitted by Teachers Insurance and Annuity Association.

firmed in its Conference report that only those adverse actions which are statutorily defined by Title VII as an unlawful employment practice are prohibited. (Pet. Op. Br. C-26).

Thus there is no support in the 1964 legislation for the Government's position, which position was flatly rejected in the 1972 Congress (see Opening Brief C-24-26).

Additionally, the remedies section of Title VII lists those employment opportunities that the statute is intended to protect, *i.e.*, where a person is "refused employment or advancement or was suspended or discharged". The denial of seniority, for example, may involve an improper denial of advancement. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1975); *Trans World Airlines v. Hardison, supra; Nashville Gas Co. v. Satty, supra.*

The proponents of the bill repeatedly stated that the bill was an *employment opportunity* provision; not a redistribution of wealth or "welfare state" statute. Even the policy statement of the Act was stricken lest it be construed as implying an affirmative duty to "redistribute" wealth. Clearly, the intent was not to regulate pension programs or benefits with respect to sex. Sharing an insurance fund is not the kind of employment opportunity reached by the statute.

Respondents argue in effect that the statute *requires* differentiation upon some basis *other* than sex in determining the amount of wages or compensation to be paid or paid. The statute does not so state.

It rather states that differentiation on the basis of sex with respect to compensation is not improper. The

Bennett amendment is not merely an exception to Title VII. Rather it "reenacts" the Equal Pay Act as narrowing the prohibitions of Title VII. As such, the legislative history on Title VII is more than "opinions" on an earlier statute; rather it defines the scope of Title VII itself.

Such was succinctly stated when the Senate Bill was returned to the House and presented there in the following terms:

> "[C]ompliance with the Fair Labor Standards Act as amended satisfies the requiremment of the title [VII] barring discrimination because of sex. . . ." 110 Cong. Rec. 15896 (Pet. Op. Br. C-17).

Moreover, Senators Bennett and Dirksen subsequently stated that such was the plain meaning and intent of the provision in Title VII.

> "Simply stated, the amendment means that discrimination in compensation on account of sex does *not* violate title VII unless it *also* violates the Equal Pay Act." 111 Cong. Rec. 13359 (Emphasis added).

The Government argues there is "no reason" to treat "distinction on account of sex any differently under Title VII than one based on race, religion or national origin." (U.S. Brief, p. 16.)

But this involves a policy question on which Congress has clearly spoken, treating the two subject matters quite differently. In fact when the substitute Senate Bill was returned to the House in 1964, congressmen reaffirmed that the subject matters were different and Congress intended they be treated differently.

The problems of race and sex in employment are plainly different as the courts have recognized. Congress did not enact a "sex blind" policy into law. Nor have any of the cases recognized any such policy. (*Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974); *Willingham v. Macon County*, 507 F.2d 1084 (5th Cir. 1975).) All of the arguments advanced by respondents to urge that such be now adopted in this forum are specious at best.

The argument of the agency that there is "no reason" for the Court not to adopt the legislation they urge is improper. Thus the Government argues that the risk of certain kinds of cancer may apparently be reduced in certain nonsmoking religious groups and that the life expectancy may be longer in these groups on that account. (U.S. Brief p. 16.) The argument is irrelevant.

The statute authorizes an employer to differentiate upon the basis of sex in determining the amount of wages or compensation to be paid. But it *prohibits* differentiating between SDA members (a religion) and others with respect to compensation even if it is true that the former can be expected to live longer than a person with a different religious identity.

Even in this area the statute does not require that the employer totally ignore the practices which may be dictated by a religious conviction (*Trans World Airlines v. Hardison, supra*). But with respect to sex it expressly authorizes differentiation on that basis of sex regarding the amount of compensation or wages paid or to be paid.

The agencies imply that the Court needs to be afraid that if the Court gives effect to the statute by holding

that "sex" is treated differently by the statute, then other courts will hold that "race, color, religion," may be used as a basis for differentiation is an argument that is not only patently ridiculous, but is also contrary to the reality.

It is tantamount to saying that if this Court enters judgment according to the law in this case, that other courts will enter judgments contrary to the law in other cases.

The opposite is true.

If this Court did not "read or obey" the law (as Chief Justice Marshall held was the Court's duty), (*Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803)) it could hardly expect the lower courts (or anyone else) to do so.

In fact this Court has impliedly reaffirmed that such is its duty. *United States v. Nixon*, 418 U.S. 683 (1974).

Accordingly, if the Court gives judgment according to the laws as Congress has declared them, it can not only rightly expect the lower courts to do likewise but the Court can rightly exercise its own power to ensure that the lower courts do precisely that.

The opposite course (as urged by the Government) would leave the lower courts subject to no authority or certainty of law; but left to guess and gamble on what possible future "policy" decisions of this Court might subsequently turn out to be in every case that might arise.

3. The Equal Pay Act Only Prohibits Unequal Rate of Wage Payments Where There Is No Other Factor Other Than Sex for Rate of Payment Differential.

The Equal Pay Act is a section of the Fair Labor Standards Act. While the government argues that there is no legislative intent shown *not* to regulate pensions under that Act, the contrary is true. The legislative history in the 88th and earlier Congresses clearly shows that the administration introduced broader bills but Congress decided to limit the proposal by making it an amendment to the Fair Labor Standards Act and so to regulate only "wages" within the meaning of that Act.

Further, just as Title VII refers to a "good faith merit system," so also the legislative history on the Equal Pay Act demonstrates that:

> "A bona fide job classification system will normally furnish the answer to a claim of discrimination [under the Equal Pay Act]." (109 Cong. Rec. 9196, Pet. Op. Br. C-1.)

Thus employees or applicants could be intentionally classified as "male/female packagers" and paid differently if there was a factor of difference other than sex between such classes.

Intentional discrimination *between* the sexes was authorized in the first instance; it was not forbidden, *prima facie*.

What is forbidden is the act of payment of wages to one sex at a periodic *rate*, less than the rate so paid to employees of the opposite sex except where such payment is pursuant to a differential based on any other factor other than sex.

Here the differential rate of payment is made pursuant to a Disability and Pension Plan *System* which withholds contributions from scheduled salary.

The System and its benefits are not subject to the Equal Pay Act. The system is itself another factor other than sex so far as the *payment* of a *wage* rate is concerned.

Here, the wage rates *paid* are different because differential *amounts* are retained for purposes of the pension system.

These amounts will be paid later—on retirement, resignation, etc.

The Equal Pay Act does not require that the *amount* paid be equal at all times.

It rather requires that the *plaintiff* prove that the payment of a lower rate was *not* pursuant to a differential based on some other factor other than unequal wages to the sexes for the same work (Pet. Op. Br. C-20-21).

Respondents object because the rate of wages paid are *differential* between the sexes. But the language "except where such payment [of such differential rate] is made pursuant to a differential based on any other factor other than sex" cannot mean the amount of the differential cannot be directly related to sex. If that were the "interpretation", the phrase would have no meaning since it would never apply.

The sums withheld from the gross salary scheduled result in payments at a different rate, but the "factors" are the Pension Plan (not subject to the Equal Pay Act) plus differential longevity, and the cost of funding for it under such Plan.

Since the amounts retained are not a subterfuge to avoid the statute, no violation of its standards are shown.

This of course assumes, arguendo, that the salary paid is subject to the Equal Pay Act limitations in the first instance.

4. Respondents' Statistical Arguments Demonstrate the Validity of Petitioners' Position.

Respondents advance mathematical arguments to try to show that the pension system is an insufficient basis to justify the differential "wage rate" payments.

Like Zeno's paradoxes, these sophistries only create mathematical illusions completely at variance with objective observable reality.

The underlying *legal* supposition of all such arguments is that petitioners have not (respondents say) made a "sufficient" showing to "justify" the difference in the amounts paid as wages. However, there is no requirement for justification, especially when respondents have *conceded* the factors of difference are actual.

Where the fact is actual, there is no basis for "any plea that in fixing and determining the amount . . . [the Petitioner] was actuated by any want of good faith." *Brawley v. United States*, 96 U.S. 168, 173 (1877).

We do address the mathematical arguments, however, to show that when the sophistry is brought to light it demonstrates the strength of the merits of petitioners' position.

The California Supreme Court has had occasion to point out the ease with which mathematical arguments may cast a spell over and mislead the trier of fact. *People v. Collins*, 68 Cal.2d 319, 66 Cal. Rptr. 497, 438 P.2d 33 (1968); Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev., p. 1329 (1971). That is something that Zeno demonstrated long ago.

The basis for respondents' argument is a graph which was introduced in evidence (apparently without any opportunity for cross-examination) in *Henderson v. Oregon*, 405 F.Supp. 1271 (D. Ore. 1976), appeal docketed (CA 9, No. 76-1706, March 30, 1976). It was attached to the opposition briefs below. Even the majority below did not accept the arguments. The amici purport to show that assuming[3] 100,000 men and 100,000 women at age 65, a "matching" of deaths indicates that about "80%" have "common death ages".[4]

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[3]As in *People v. Collins, supra*, this involves an unwarranted statistical assumption and leads to incorrect conclusions. There are in fact more women alive after age 65 than men after that age. The assumptions arbitrarily exclude this fact. Further, "matching" or "pairing" deaths of women and men between ages 65-70, for example is somewhat misleading. Given an assumption of 5 years difference in life expectancy (as indicated by the graph in the *Henderson* case, *supra*), the *proper* comparison would be between women age 65-70 and men age 60-65, *i.e.*, 5 years earlier. Finally, the difference in life expectancy is not a constant "5-year" difference but varies at each age. In other words "life expectancy" is an actual factor related to age *and* to sex, but not to either age or sex alone.

[4]Various amici present the same idea with differing percentage figures. But the idea seems to have been first proposed by Professor Barbara Bergmann and presented by Women's Equity Action League (Amicus Curiae for respondents) to the Department of Labor by Dr. Norma K. Raffel at hearings on contract compliance held on September 9, 1974. At that time the "overlap" of 1000 men and 1000 women was said to be 68.1%.

The figure of "80%" and the phrase "common death age" are ambiguous. They appear to mean that relative length of life may be shown thus:

	Shorter Lives	Common Life Period	Longer Lives
Men	20%	80%	
Women		80%	20%

The conclusions to be drawn are:

1. 20% of the shorter-living men must pay for the pensions of 20% of the longer-living women on a "unisex" approach; and
2. on a "unisex finding" basis, 20% of the men receive less than zero benefit from a "unisex funding" system, only 80% of the men receive benefits commensurate with their funding; on the other hand 80% of the women receive benefits commensurate with their funding, 20% of the women receive benefits *greater* than their funding; and
3. every woman is guaranteed that she shall outlive *some* man by five years (*i.e.*, while every woman will not live to the average age of women, every woman will outlive the "corresponding" man by five years and the average death age of men is 5 years less than the average death age of women; and
4. of the total benefits paid to 100,000 men and 100,000 women 20% of the cost of funding benefits ostensibly for men is thereafter applied to pay benefits collected by women; and
5. benefits can be paid to 100,000 men and 100,000 women *only* if a substantial number of additional men are part of the plan and die before receiving any benefits at age 65, since

by hypothesis, the average life expectancy difference of all women is 5 years longer than the average life expectancy for men and the only men shown on the table are those who live to age 65.

The brief of American Council of Life Insurance (pp. 47-49) details the fallacies.

The equities of funding are that if a male and a female buy an annuity they each gamble that it will be sufficient to support them for their entire life expectancy. Ideally, the contributions they each make to purchase an annuity should be sufficient for that purpose. Neither should be left to live without sufficient funding to cover the expected retirement years, nor be asked to fund a life expectancy that he or she will not reach.

Where an annuity is based upon sex-differentiated actuarial tables the male and female have "equal opportunity" of living to the life expectancy funded for each. Where a so-called "sex-neutral" or "unisex" table is constructed, the male funds a life expectancy longer than his true life expectancy. His "opportunity" for collecting what he has purchased is lessened. On the other hand, the female's "opportunity" for collecting more than she has purchased (including a portion of the male's funding) is increased. Such is the basic inequity of respondents' proposal.[5]

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[5]A simple example of the effect of unisex can be posited. If a hospital had 100 nurses of which but one was male, a retirement system set up by the employer for the nurses on a unisex basis would require that the lone male contribute at a rate which was 99% of the female rate. The lone male would be penalized to benefit 99 females. Respondents' argument suggests precisely this.

This example also illustrates that the sex of an individual must be taken into account in funding and in benefits. Under a "uni-

(This footnote is continued on next page)

Respondents suggest that your petitioners could use a "multi-factor" table to measure contributions and benefits. As we stated in our opening brief, the inclusion of other factors would not make sex a valid basis if it was not to begin with. Nor does the omission of other factors make a differentiation on this single most significant basis improper.

Moreover, the addition of these other factors would probably lead to less accurate funding. Smoking, drinking and obesity are within the control of the individual. Obviously, an annuitant who wanted the lowest rate would start smoking, drinking and be overweight when he buys his annuity and then quit such practices. In an insurance context, such factors make sense. Individuals want to live longer and want to get a lower insurance rate. Public policy encourages good health. In an annuity context, they are nonsense. First, because the annuitant does not want to both die early and get a lengthy annuity. Second, because the risk of non-smoking, non-drinking and non-obesity is on the insurer.

Respondents suggest that since petitioners "equalized" the women's contributions down to the male rate in 1975, the Plan has been operating, and there are no problems.

They suggest that such is a reason to hold that there was a violation before the change and therefore

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sex" approach, if one of the 99 females *resigns* and a second male employee takes her place, the contribution rate received from all employees *decreases* since the potential liability of the plan decreases. On the other hand, if the lone male *retires,* and a female employee takes his place, the contribution rate goes up, not only because another female may be funded for, but also because the liability of the plan is *less* than it would have been had one of the 99 females retired rather than the lone male with a shorter life expectancy.

this Court should order permanent "unisex" Plan operation and refund of back contributions. The argument is a transparent attempt to have the Court again set policy, by implying that there will be "no harm" in so doing because, they say, the Plan has not suffered. They wrongly state that equalization was accomplished by use of a so-called "sex neutral" table. (Resp. Br. 21.) That is a deliberate attempt to mislead the Court. The Plan is still operated with the use of sex-differentiated actuarial tables. In compliance with the state law (Gov. C. §7500), your petitioners lowered the contribution level of females to the male level. The Department has since contributed the difference.

Of course, other facets of the Plan, such as male contributions, employer contributions, joint and survivor annuity options, vested rights pensions and so forth are still measured and administered based upon sex-differentiated mortality tables.

The briefs of the supporting amici and the study conducted by the Equal Employment Opportunity Coordinating Council as previously noted indicate the widespread potential damage of the lower court decision. We have also cited to the court some of the suits seeking equality and return of contributions on a local and national level.

Even the amici who state that their plans are equal in contributions and benefits, probably use separate mortality tables when it comes to measuring joint and survivor annuities.

Finally, while the statute does not require a showing "in equity" as a reason for differentiating upon the basis of sex with respect to the *amount* of wages or compensation paid, or to be paid, we would mention the following:

1. If the employer had established no system and withheld no contributions for pensions, females would have to pay considerably more for the same periodic benefits as males and would also be deprived of the higher 110% matching benefit on the higher amount they contribute not to mention funding of formula benefits.

2. It is a social fact that women (particularly married women with children) often enter the labor market later (after the children are grown) and retire earlier in order to retire together with husbands who are usually older. The plan provides a return of contributions or a "vested rights" benefit based only on contributions of employer and employee if employee so chooses.

We do not offer this as a matter of proof in legal justification for the system established or for a "violation". We mention it to point out that there are many social factors which can best be met by local government determinations.

3. The order of the courts below deprived *some* women of a substantial benefit.

Since the "vested rights" pensions for employees who retire after making more than one year's contributions but less than five (or who leave the Department and defer their retirement until a late date) is based on the employee and employer 110% matching contributions, the courts' order reducing female contributions necessarily *also* reduces the matching amount and therefore the amount of pension such women might otherwise receive and some of the plaintiff women who have already retired will be adversely affected by the court order.[6]

II

1972 LEGISLATION ON TITLE VII AND 1974 PENSION LEGISLATION DEMONSTRATES INTENT NOT TO REGULATE GOVERNMENTAL PENSION SYSTEMS OR TO REQUIRE "UNISEX" POLICIES.

The legislative history of the years since 1963 indicate two things: first, Congress did not intend to prohibit the use of sex-differentiated actuarial tables in establishing plan benefits; second, Congress did not intend to regulate local government pension systems.

It has always been accepted procedure in retirement and annuity plans to measure contributions or benefits

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[6]The government's brief urges that the Department sometimes pays more for men than for women. It bases this contention on an answer to an interrogatory concerning six females compared with six hypothetical males described by certain peculiar assumptions stated in the Interrogatory. The *fact* is that prior to 1972, women could retire at age 60, at full pension; men were required to work until age 65 to receive full pension. In the three of the six hypothetical comparisons to which the government refers it was assumed (as dictated by the Interrogatory) that the hypothetical men had retired *before* age 65, but at full pension. This also dictated an assumption of a longer life expectancy for such hypothetical males than if they had retired at 65. It also dictated an assumption of *full* pension payable beginning *before* age 65 rather than one reduced because of early retirement.

Thus the Interrogatory dictated that the hypothetical contributions made by the hypothetical male employee during his employment would have been lower (and the Department's ultimate contributions therefore higher) by reason of the fact that he would be contributing as if he were going to retire at age 65, and then actually retire before that time on full pension. Since the Interrogatory itself asked for figures on an "apples and oranges" comparison a valid conclusion cannot be drawn from the figures given in response to the questions as asked.

by the use of sex-differentiated actuarial tables. Private annuities were similarly funded.[7]

Nothing in the legislation indicates disapproval of such practices. To the contrary, the legislative history shows such systems are not regulated and consideration of costs in relation to longevity benefits authorize paying unequal wages. (See Pet. Op. Br., C-1-18.)[8]

It was not until 1974 that there was a change in the practice of the Social Security System cited by Senator Humphrey in his colloquy with Senator Randolph (110 Cong.Rec. 13663-4) of allowing earlier retirement options for women than for men. P.L. 92-603; 86 Stat. 1329, Social Security Amendments of 1972. We do not debate the wisdom of such options[9] herein but merely cite them to indicate that if Congress intended eradicating the use of sex-differentiated actuarial tables as an unlawful employment practice, it would certainly have changed rather than continue to approve the practice of earlier retirement options.

Until 1972, the provisions of Title VII (and the Equal Pay Act) did not apply to local government,

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[7]See amicus curiae brief of American Council of Life Insurance for list of state laws differentiating on the basis of sex in connection with retirement, annuities and insurance. Even Jury instructions commonly award different actuarial values for life expectancies.

[8]Other federal agencies than the EEOC continue to accept the use of sex-differentiated tables as a basis for measuring retirement benefits. 41 CFR §60-20.1(c) p. 287, Office of Federal Contract Compliance; 29 CFR §800.116(d) Department of Labor; 40 Fed. Reg. 24135 (1975) Department of Health, Education and Welfare.

[9]We do note that the cases dealing with *mandatory* earlier retirement for females are inapposite because such practice denied an employment opportunity to one sex to continue in employment, and did not involve differentiation regarding compensation. *Cf. Nashville Gas Co. v. Satty, supra.*

and this Court has held that the Fair Labor Standards Act does not apply. (*National League of California Cities v. Usery*, 426 U.S. 833, 845, 49 L.Ed.2d 245, 253.) It is also questionable that Title VII applies to private insurance plans.[10]

The 1972 decision not to define discrimination in terms of "systems" reflects determination of Congress not to be involved in local retirement plans. Such is surely based on Congress' decision that it is unnecessary to invade areas of local control best handled by the people directly concerned. Thus, in the Department's Plan, the Respondents themselves participated in the administration. One of the named plaintiffs was a member of the Board of Administration. (App. 90.)

In the 1972 legislation, if Congress had intended to change its prior approach and regulate pension systems or prohibit differential contributions and benefits, it surely would have done so. After all, in 1968, the second circuit expressly held that females could receive greater benefits than males under the Social Security Act, and that such provisions would not violate the Civil Rights Act of 1964. (*Gruenwald v. Gardner*, 390 F.2d 591, 593 (2d Cir. 1968).)

Further, in 1974, Congress for the first time enacted legislation where it clearly intended to become involved in pensions. That legislation and its history demonstrate both that Congress was not concerned about the use of sex-differentiated actuarial tables and that Congress did not want to regulate Governmental plans.

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[10]Except as ERISA may apply, it is questionable that all *private* insurance plans are subject to Title VII, since in those states with regulation of the business of insurance, insofar as the Government is concerned, insurers are subject *only* to such state regulation. *McCarran-Ferguson Act* (15 U.S.C. §1012(b)); *F.T.C. v. National Casualty Co.* (1957) 357 U.S. 560, 562.

The comprehensive nature of the Employee Retirement Income Security Act ("ERISA"), the careful attention to detail in the regulation of vesting, funding, actuarial responsibilities and insurance of benefits make it apparent that if Congress ever intended to mandate identical contributions and benefits in retirement plans (assuming mathematical equality were possible) it would surely have done so in this particular act.

The fact that the Act specifically deals with discrimination problems under the tax qualification provisions, prohibiting discrimination in favor of higher paid employees and management indicate Congress' intention not to regulate the practice of funding separately for males and females based on long established actuarial principles. (§401a(4) IRC (1954), 26 U.S.C. §401a (4).)

Similarly roll-over provisions of ERISA permit an employee to leave one employer, and transfer both his and the employer's retirement contributions to an individual retirement account or to a different retirement plan. (Act, Section 2002(b), IRC (1954) Section 408, 26 U.S.C. §408.) There is no provision that such roll-over prohibits the transfer of higher contribution packages for females than for males. Under Respondents' theory, Title VII would prevent females from transferring higher benefits than males. Alternatively, a unisex approach would, of course, lead to females and males receiving different annuities upon reinvestment privately of their returned contributions. We are unaware of any provision of ERISA which requires identical contributions and benefits.

In the legislative history, the House was concerned about increase in pension costs of the legislation.

In addition, in connection with ERISA, House Report No. 93-533 states:

> "While modest cost increases are to be anticipated when the Act becomes effective, the *adverse impact* of *these increases* has been minimized." (Emphasis added.) 3 U.S. Code Cong. & Adm. News, H.R. 95-533, p. 4639.

In the House Report at page 4651 the Education and Labor Committee commented on the vesting standards of ERISA:

> "The exception for plans which provide 100% full vesting upon plan entry is based on the fact that such plans, like the TIAA-CREF plan for college teachers, provide earlier vesting in larger amounts than provided under the bill, and requiring such plans to install earlier membership requirements would impose *burdens well beyond* the *minimum standards* approach intended by the Committee, and might compel such plans to sacrifice immediate full vesting on plan entry." (Emphasis added.)

Such attention to the individual provisions of the excellent TIAA-CREF system demonstrates an intention not to disturb that system and systems like it.

No goal was sought to provide *greater* benefits under ERISA for one sex than another. On the other hand, the serious effect of mandating identical periodic contributions and benefits as urged by respondents herein is well documented in the amicus briefs of Teachers Insurance and Annuity Association of America and College Retirement Equities Fund (TIAA-CREF), the City of New York and New York State Teachers Retirement System. (TIAA-CREF Br. p. 24, City of

New York Brief p. 5, N.Y. State Teachers Brief p. 2.)[11]

The Act, while clearly concerning itself about the vesting of benefits (a matter which involves loss of pension benefits during the first years of service in the private sector) involves a studied determination not to attempt to set benefit levels for any employees. Had the Act or the legislative history mandated disregard of sex-differentiated actuarial tables and pension benefits and contributions measured thereby, Respondents and their amici would have pointed this out. All they have pointed to is that the statute while mandating actuarial soundness does *not* mandate disregarding greater female longevity and the concommitant variation in pension benefits between the sexes.

In considering the cost of vesting provisions under Senate Report 93-127 (3 U.S. Cong. & Adm. News '74, p. 4884), the Senate Committee on Labor and Public

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[11]In addition to the above, other systems face liability of varying degrees. For example, the County of Los Angeles presently has two similar suits to the within lawsuit. (*Rosina Smith v. County of Los Angeles* (C.D. Cal. 74-253); *Bailey v. Los Angeles County* (75-3863 C.D. Cal.).) Contrary to the generalized statement of the Society of Actuaries, a Washington based firm (Soc. Act. Br. p. 18), until January 1, 1977, the *entire* system of retirement Plans covered by the County Employees Retirement Law of 1937 (California Government Code §§31620-31622, 31676.1) which involves the employees of twenty California Counties (the *County of Los Angeles* alone has some 70,000), had *both* unequal *contributions* and unequal *benefits* in their systems. And, while those under the 1937 Act equalized contributions and benefits as of January 1, 1977, they still face lawsuits seeking returns of contributions and changes in benefits, and there are other California public entities similarly situated. See also expected increases in costs projected by Equal Employment Opportunity Coordinating Committee ("EEOCC") of $60 billion for "equalizing" under their proposed legislation BNA Daily Lab. Rep. No. 80, April 23, 1976 at A-12; *Id.* No. 122, 6-23-76 at A-16-17, E-1 to 3.

Welfare had before it an actuarial study prepared by Donald S. Grubbs, Jr., FSA. That study states, at page 4885:

> "Private pension plans contain endless variety. They contain variety in their plan provisions, including existing vesting provisions, in the extent of their funding, in the distribution of employees they cover by age, *sex*, and years of service in their rates of termination of employment of plan participants, in rates of investment return on their funds, and in many other factors." (Emphasis added.) (*Cf.* Society of Actuaries Brief.)

If the Congress had intended that "sex" be ignored as to the differences in benefit costs and measuring the expense of differing benefits because of life expectancy differences, this study would have become totally useless. (See 3 U.S. Cong. & Adm. News '74, pp. 4908, 4909 re: Committee's actuarial reporting.)

Under "STATEMENTS BY LEGISLATIVE LEADERS" the Honorable All Ullman, ranking majority member of the House Ways and Means Committee, stated:

> "It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employees who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed. For this reason, we have been extremely careful to keep the additional costs very moderate." (3 U.S. Cong. & Adm. News '74, p. 5167.)

Of course, if the legislative intent had been to mandate identical treatment although it costs more there would have been no need for the EEOCC or the legislation it proposed. Even the legislation proposed does *not* eliminate sex-differentiation in the measurement of joint survivor annuities. (See BNA Daily Lab. Rep. No. 80, April 23, 1976, A-12; *Id.* No. 122, 6-22-76 at A-16 to 17, E-1 to 3.)

The Courts have held that ERISA was intended to preempt *local law* in the pension area. (*Hewlett Packard v. Barnes,* 425 F.Supp. 1294, 1297 (N.D. Cal. 1977); *Wayne Chemical, Inc. v. Columbus Agency Service Corp.,* 426 F.Supp. 316, 320 (N.D.Ind. 1977); *Hurn v. Retirement Fund Trust,* 424 F.Supp. 80, 82 (C.D.Cal. 1976); *Assaro v. Harnett,* 414 F.Supp. 473, 474 (S.D.N.Y. 1976) aff'd 553 F.2d 93.) Surely, such preemption by this law makes it clear that Congress did not intend to override local laws concerning sex differentiation in contributions and benefits.

Congress exempted the local governments from the provisions of ERISA. (29 U.S.C. §1003(b)(1).) While it has bills under consideration to regulate such plans, it has chosen not to adopt any. This caution comports with the Court's decision that regulation of local government wages under the Fair Labor Standards Act is violative of the Tenth Amendment to the Constitution. (*National League of Cities v. Usery,* 426 U.S. 833, 845, 49 L.Ed.2d 245, 253; on local control see also *Oregon v. Mitchell,* 400 U.S. 112, 128 (1970).)

To administer ERISA, Congress chose two agencies which had theretofore recognized the use of sex-differentiated actuarial tables to provide for separate contributions and benefits in retirement system (the Department of Labor and the Internal Revenue Service). While arguably the Pension Benefit Guarantee Corporation ("PBGC") might wish to insure up to the PBGC "maximum benefits" for males and females in an identical fashion (41 Fed. Reg. 6194-95) nevertheless, when it comes to insuring sufficiently funded plans, the PBGC requires the use of sex-differentiated actuarial tables. This is clear government recognition that pension plans cannot be soundly administered on a "single-sex" basis. The EEOC would use this single statement by the PBGC on insuring benefits to bootstrap the EEOC into power to regulate local pensions systems and the benefits payable thereunder where Congress *did not empower* it to act at all. Further, since Congress has seen fit not to regulate pension systems of local government, surely to attempt to do so under Title VII violates the local sovereignty. (*National League of Cities v. Usery, supra,* pp. 848-849.)

There is no warrant under the 14th Amendment for such regulation.

III

GUIDELINES AND BULLETINS MAY NOT BE GIVEN EFFECT AGAINST A LOCAL GOVERNMENTAL ENTITY SINCE THE ADMINISTRATIVE PROCEDURE ACT WAS ADOPTED AFTER SKIDMORE v. SWIFT AND THE AGENCIES WERE GIVEN NO JURISDICTION WITH RESPECT TO LOCAL GOVERNMENT ENTITIES.

One of the amici supporting Respondents has candidly admitted that the administrative bulletins and guidelines are "an internally inconsistent morass." (U.A.W. Br. p. 53.)

The President of the United States has recently expressed a similar view of the entire administrative field. He proposes to order that all administrative pronouncements be "as simple and clear as possible . . . and should not impose unnecessary burdens on the economy . . . or on state and local governments." 42 Fed. Reg. 59743, November 18, 1977.

The President's goal and policy is noble, necessary and proper.

If the Court can give weight to pronouncements of the executive branch not binding under the Administrative Procedure Act, then *this* goal and policy can and should be given full force and effect by judicial action in the instant case. This can best be done by holding that none of the administrative bulletins or guidelines heretofore issued are entitled to any weight *against* Petitioners in a *de novo* proceeding.

There are *other* major reasons requiring that that be the holding. Such will greatly assist in *judicial* administration of law as we shall show.

We point out first that in 1944, this Court was similarly faced with an administrative morass. It therefore laid down guidelines for the lower courts as to what factors such courts should consider in deciding what effect (if any) to give to administrative pronouncements in a given situation. *Skidmore v. Swift & Co.*, 343 U.S. 134 (1944).

Thereafter, Congress acted on the subject. It enacted the Administrative Procedure Act. That Act was adopted after more than ten years of many comprehensive studies.

President Roosevelt had warned that there was an issue of Constitutional proportions, that growing powers of administrative agencies

> "who perform administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution." House Report No. 1980, May 3, 1946; U.S. Code, Cong. Service 79th Cong. 2nd Sess., p. 1195. (1946).

The legislative history of the Administrative Procedure Act shows that agencies that had power to regulate, opposed any regulation of themselves. Aversion by the agencies to limitation on their exercise of real or pretended power continues to the present day. (Davis, *Administrative Law*, 3d Ed., p. 68.)

Congress passed the Administrative Procedure Act despite such administrative opposition. It specified that Act was intended to have "across-the-board" application: "The law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure." House Report, *supra*, at 1198.

Accordingly the Act provided that *no sanction shall be imposed* or *substantive rule issued* except (1) within

the jurisdiction delegated to the agency and (2) as authorized by law (Sec. 9, Ch. 324, Pub. Law 404, U.S. Code Cong. & Adm. News, p. 234.)

Thereafter, when Congress passed the Equal Pay Act in 1963 and Title VII in 1964, it did *not* authorize any agency to issue any rules *or* delegate any jurisdiction to any agency. Jurisdiction means, of course, authority or power to speak the law to the facts.[12] The agencies were given *no* such power. In 1972 Congress again determined *not* to delegate any such power to the agencies.

The legislative history of Title VII and the Equal Pay Act conclusively shows that Congress specifically intended that the agencies not have any such authority or jurisdiction. Both agencies have implicitly recognized they have no such power. The earliest guidelines of the EEOC (1966) were issued in the form of what the EEOC "advocates," "encourages" and "recommends" that employers do. EEOC "Guidelines on Employment Testing Procedures, Sept. 21, 1966, 2 CCH Empl. Prac. Guide ¶16,904 (1967). The mentor of such guidelines has frankly acknowledged that the EEOC issued " 'guidelines' since it had no substantive rule-making power." Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission,* 38 Geo. Wash. L. Rev. 694 (1970). Deferring to such guidelines is thus abdication of responsibility and contrary to law.

Of course, many of such guidelines and bulletins were issued before Title VII even applied to local governmental entities.

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[12]"This word is composed of jus and dictio, *juris dictio,* or a speaking and pronouncing of the law", The Federalist, No. 81, p. 531, (Mod. Lib. Ed.)

In 1972, in extending Title VII to local governmental entities, Congress did *not* grant quasi-legislative authority to the agency *or* extend EEOC jurisdiction over such local governmental entities. On the contrary, *both* houses of Congress determined that in regard to such local governments, the public interest would be represented in such cases *not* by the EEOC but by the Attorney General. In a similar way, Congress *divided* the power which was originally proposed to be given to the EEOC among several agencies. The reason, simply, is that while separation of power may lead to diversity, it also tends to protect liberty by lessening the corrupting effect which power has.

Thus, while *Skidmore, supra,* speaks of pronouncements of "the office representing the public interest in its enforcement" before the Courts (343 U.S. at 138) the office representing the public interest before the courts where a local governmental entity is involved is *not* the EEOC but the Attorney General. Congress specifically intended that distinction.

Accordingly, even under the *Skidmore* rationale none of the pronouncements of such agencies could have any effect against a local public entity.

Moreover, the passage of the Administrative Procedure Act *after* the *Skidmore* decision clearly limits the authority of *Skidmore* so that no effect may be given guidelines and bulletins against a *public* entity in a *de novo* or other judicial proceeding under Title VII.

The administrative morass at the time of *Skidmore* required guidance for the *lower courts* as to what factors they should consider in determining what legal effect (if any) they should give to a vast variety of administrative pronouncements.

But when Congress *thereafter,* pursuant to its express constitutional authority to make *"all* laws necessary and proper" for carrying into execution *"all* powers vested in the Government or in any department or officer thereof," (Const. Art. I, § 8 Cl. 18, Pet. Op. Br. p. A-1) exercised that power to enact the Administrative Procedure Act as an "across the board" statute, a radically different state of affairs is presented than the situation presented in *Skidmore v. Swift.*

Thus this Court has recently held that rules duly issued pursuant to a statutory grant of authority are binding on all three branches of government. *United States v. Nixon, supra,* p. 696. Given the fact that Congress has the power to make all laws necessary and proper for carrying into effect *all* powers of every department of Government, that holding was *surely* correct.

But if a regulation issued pursuant to procedures of the Administrative Procedure Act is binding on all three branches of government, the Administrative Procedure Act itself is so binding *a fortiori.*

In other words, if Congress has exercised its constitutional power to declare what shall be done by agencies who desire to issue pronouncements which they have jurisdiction to issue in interpreting a statute, the courts may not directly, or in effect, lay down *other* standards for the agencies, or confer power to issue *other* kinds of pronouncements interpreting the law and give legal effect to the pronouncements so issued.

The Administrative Procedure Act provides that no sanction shall be applied except for rules issued in accordance with the procedures laid down in that Act. The other two statutes before the Court (Title VII

and the Equal Pay Act) specifically withheld from the agencies any authority to issue any such rules.

The legislative history also shows that bulletins or guidelines issued by an agency should not have any weight as evidence *against* defendant.

If the Court would give either any injunctive or evidentiary sanction to any "guideline" or "bulletin" issued by any such agency, to rule against Petitioners as did the courts below, this would in effect be holding that the Administrative Procedure Act is not binding on the agencies or the courts, that the jurisdictional limitation of Title VII (which requires *de novo* determinations by the District Court) is not binding on the courts below, that the Congressional will to withhold quasi-legislation and quasi-judicial power from such agencies need not be given effect, but may be disregarded.

Such a holding would be nothing less than an amendment of the Constitution itself—Congress would no longer have the power to make *all* laws for carrying into execution *all* the powers of government. Instead, the administrative agencies would make "laws," or more accurately *use* the "laws" to carry out such policy decisions as the agencies might make or such political or economic purposes they might elect.

No longer would the people have an open forum (*i.e.* Congress) in which to petition the government for redress of grievances, nor would policy decisions be made by persons directly answerable to the people.

In a given policy controversy, many persons (such as the men under Petitioners' Plan and their non-working wives) are not represented before the Court. There is always a danger that they may be permanently

foreclosed not only from "their day in court" but also from "their day" in any *other* forum. This is a point addressed by no less authority than President Lincoln on no less an occasion than his first inaugural.[13]

By maintaining Congress as the proper forum for resolving competing legislative policy views the force and violence of "faction" may be lawfully restrained.[14] This is a problem with which the founding fathers were thoroughly familiar and which they acted to ensure.

If, for example, an ideological faction can through an agency, *use* a law of Congress to effect its own economic policy decisions (instead of being required to be faithful to the law itself) then the will of Congress (as expressed in that law) is no longer paramount and there is no restraint upon that faction.

The point is not academic.

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[13]"At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." Abraham Lincoln, First Inaugural Address.

[14]The Federalist Nos. 9, 10 (Mod. Lib. Ed.):

> "By a faction, I understand a number of citizens . . . who are united and actuated by some common impulse or passion. . . ." (*Id.* p. 54.)
>
> "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mash its violence under the forms of the Constitution" (*Id.* p. 57.)
>
> "Theoretic politicians . . . have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions." (*Id.* at pp. 58-59.)

In its brief the EEOC frankly urges that its positions or perceptions "evolve" (*i.e.* change) and that it or the courts not only can but should *cause* the law to "evolve" according to the EEOC's changing perceptions and positions. (U.S. Br. p. 31 fn. 27). In fact, in the same context, EEOC cites the 1972 Senate Report which is almost a verbatim copy of the House majority report on this point. These reports were rejected by the joint conference action. (Pet. Op. Br. C-24-26.)

The report said "experts" now perceived problems differently. But *Congress* did not. And Congress duly decided *not* to change the statute to define unlawful discrimination to suit such perceptions or to permit the "experts" to exercise that authority. In fact its Conference action expressly reaffirmed the jurisdictional limitations for this reason. (Pet. Op. Br. Ex. C-26.)

The issue, moreover, appears *not* to be *personal* discrimination, but economic regulation *per se*.

Respondents similarly rely on the House Committee Report of the rejected 1972 bill to advance their position. But the bill this report refers to was rejected. Hence this is simply a call on this forum to legislate what the legislative forum did not.

Further, another *Amicus* urges that since the "Esch Amendment" failed, this means Congress intended to regulate pensions and differentiations based on sex. (U.A.W. Br. p. 41.)

The opposite is true. The Esch Amendment was proposed to restrict the application of the broad prohibitions of a proposed House Bill if that broad proposal should not be rejected. Since that broad prohibition was rejected, the Esch restriction was unnecessary since

existing law does not regulate pension systems or differentials based on sex.

The point again is that having proposed broad legislation concerning pension systems and sex discrimination and having lost in Congress, the EEOC thereupon issued "sex guidelines" in 1972 and has sought in a judicial forum to have Title VII so amended.

Here the EEOC (the agent) is independent of the executive branch, and so is called an independent agency, but it is not independent of Congress. The agent's only proper recourse is to its own principal. To seek a change of the terms of its agency in another forum than Congress is to fail to be faithful to the expressed will of its own principal.

". . . Agency power . . . carries with it the responsibility not only to remain consistent with the governing legislation . . . but also to employ procedures that conform to the law." *Morton v. Ruiz,* 415 U.S. 199, 232 (1973).

Similarly, this Court has on several occasions rejected guidelines of the EEOC either expressly or by implication of this Court's holding on a particular point. The response of the EEOC to the Court's rulings has never been (so far as we are aware) to amend its guidelines to conform to such rulings in order that the public be accurately informed.

Rather the EEOC has either ignored this Court's rulings or has issued new pronouncements which nullify, in effect, the holdings of this Court.

Even the judiciary can be misled by such agency pronouncements as in the instant case for example. And when the lower courts are told by the agency

that they *must* "defer" to the agency, it is necessarily difficult for such courts to hear the voice of *this* Court, to which they are constitutionally subject.

Examples of EEOC action follow:

1) Compare 29 C.F.R. § 1607.3 (EEOC definition of "discrimination" as involving "protected classes" *with* Title VII, § 703(a)(2)) *prohibiting* classification.

2) Compare *Espinoza v. Farah Mfg. Co.,* 414 U.S. 86 (1973) *with* 38 Fed. Reg. No. 149, Aug. 3, 1973, and 29 C.F.R. § 1606.1 ("amendment" nullifying decision).

3) Compare *Teamsters v. United States, supra,* and *United Airlines Inc. v. Evans,* 431 U.S. 553 (1977) *with* "Interpretive Memorandum" (nullifying all factors that might show a good faith seniority system) CCH EPD ¶ 5029, July 1977, pp. 3104, *et seq.*

4) Compare *Weber v. Kaiser Aluminum & Chem. Corp.,* 563 F.2d (5th Cir.) decided November 17, 1977, *with* "Interpretive Regulations Guidelines" 42 Fed. Reg. 64826, dated December 28, 1977.

5) Also note *Griggs v. Duke Power,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (new "guidelines" issued *after* certiorari was granted and attached to a brief, precluding other parties from Freedom of Information Act or other process to make a record on their background or content).

The effect of EEOC guidelines may be to prejudice the views of District Court judges (as in the instant case so that the defendant can scarcely expect an independent, impartial *de novo* hearing. Thus, the 1972 EEOC guideline on "sex" leads to the conclusion (if one assumes that EEOC has *any* legal jurisdiction to issue such pronouncements) that differentiation upon

the basis of sex whether "rational or irrational" is unlawful even though the *statute* says the opposite.

Moreover, the matter of "testing guidelines" does not pose a special problem. Courts have proved themselves competent to pass on questions of test reliability and test validity. *Almassy v. L.A. County Civil Service Com.*, 34 Cal.2d 387, 210 P.2d 503 (1949).

In a judicial forum the guidelines on testing seem only to take from the trial judge the responsibility to make rational decisions, or to force irrational decisions because of certain assumptions of statistical methodology, which are not always recognized as mere methodological assumptions. Morrison and Henkel, *The Significance Test Controversy* (1970, Aldine Publishing Co.). Employment decisions involve classifications and judgments in individual cases; and since that is the nature of a lawyer's business also, we cannot imagine that the problems of employment discrimination are "too complex" or the statute too obscure, to require agency "guidelines" to direct the decision.

Because the issue is important, the background of the "guidelines" on testing and certain other aspects of the subject are addressed in the appendix attached hereto.

We would submit that if "guidelines" only state when the agency believes it has *reasonable cause* to believe that a violation has occurred, it has fulfilled its function when all know that is its function and it has no place in a *de novo* proceeding.

Accordingly, we submit the Court should hold both as a matter of law and equity, and as a matter of efficient administration of law that the "guidelines" and "bulletins" are without legal effect at least against

local governmental entities. Holding herein that bulletins and guidelines are entitled to no weight *against* a defendant will greatly facilitate the administration of laws. Even the EEOC will benefit. It can then clear up its backlog of cases because it can cease the laborious and totally unnecessary process of writing "opinions" as to when "reasonable cause" is found, which opinions (according to their mentor) are written for the sake of influencing the courts (Blumrosen, Op. Cit., *supra* p. 733).

IV

UNDER THE FOURTEENTH AMENDMENT, CONGRESS MAY NOT REGULATE BENEFITS PROVIDED IN PENSION PLANS OF LOCAL GOVERNMENT ENTITIES OR IMPOSE ANY STANDARD REGARDING COMPENSATION, EXCEPT UNDER A RATIONAL BASIS STANDARD.

Respondents cite the case of *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717 (1966), in opposition to Petitioners' position. Actually that case supports Petitioners.

"Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach, supra* p. 651.

We submit that since the question *whether* to enact legislation under the 14th Amendment is a decision for Congress to make, and since Congress has elected

not to legislate with respect to the pension systems of local governments, the present statutes may not be extended to that subject matter. Nor may Congress adopt legislation which exceeds its 14th Amendment equal protection powers. *Katzenbach, supra* p. 651 fn. 10.

We submit that if Congress were to enact a statute, ostensibly under its 14th Amendment power, determining that blacks or yellows or whites not be permitted access to the federal courts for the purpose of remedying denial of their civil rights, this Court could not constitutionally enforce such legislation.

Having been added to the Constitution, the 14th Amendment, just as any other amendment to the Constitution, becomes a part of an integrated writing, and must be construed with other provisions such as the 10th Amendment.

What then is the standard of equal protection which limits Congress under the Constitution? We respectfully suggest it is the same standard it has always been, the standard set for all other legislation under the 14th Amendment—rational basis, or in certain areas compelling governmental interest.

Thus we question whether Congress could enact a law favoring females over males without a rational basis therefor *under* its 14th Amendment power.

If Congress did not or could not act under the 14th Amendment then it acted under another power such as the Commerce Clause. Where Congress acts under the Commerce Clause, however, if it invades an area reserved to local government it violates the 10th Amendment. *League of California Cities v. Usery, supra,* 842-844.

As stated by Justice Black in *Oregon v. Mitchell,* 400 U.S. 112, 128 (1970):

> "[T]he power granted to Congress was not intended to strip the states of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole nation."

Thus, assuming that Congress intended to act within its 14th Amendment powers, it intended no different meaning to discrimination than was the common understanding in 1964. And, as previously noted, Congress did not mean to change that in 1972.

This Court recognized that principle in *General Electric, supra,* p. 145 and at least one District Court agrees. *Blake v. City of Los Angeles,* 435 F.Supp. 55, 63 (C.D. Cal. 1977) on appeal in the Ninth Circuit.

We submit therefore, that examined under the rational basis review standards, the retirement system passes muster.

V

RESPONDENTS FAIL TO SHOW ANY CONVINCING REASON FOR THE COURT TO REVERSE ITS RECENT DECISIONS RESPECTING DIFFERENTIAL AMOUNT OF COMPENSATION BASED ON A FACTOR CORRELATED WITH SEX.

The Respondents and their amici curiae constitute a Greek chorus for the proposition that the Supreme Court was wrong in its interpretation of the statute in the *General Electric* case. Together they seek to have this Honorable Court reverse itself.

In order to do that, the Court must ignore the will of Congress, ignore the plain language of the statute, disregard the opinions the Court has set forth in *General Electric* and in *Nashville Gas Co. v. Satty* (*supra*), and disregard the numerous agencies—federal, state, local and private—which plainly disagree with Respondents' interpretation of the statute.

Even if we were to concede, which we do not, that there is any legislative support at all for Respondents' position, the opposing evidence is so strong that at best this Court should return the matter to Congress to determine whether that body in fact wishes to enact the kind of legislation sought by Respondents. While Respondents conceded the issue of females' longevity as supported by the record, and do not question the actuarial basis for funding male and female pensions under the Plan, their briefs and those of the amici are replete with suggestions that there is little or no difference. (The very statement of Respondent, Alice Muller, that there are approximately 400 women who are surviving spouses of Department employees and 3 men who are surviving spouses of female employees receiving benefits under the retirement plan would appear to be further evidence of the degree of difference in longevity.) (App. p. 44.)

This Court recognized the cost of pregnancy benefits as a factor correlated with sex, the denial of which benefits, despite such correlation, was not a violation of the Equal Pay Act. The Court recognized that differences in industrial benefit plans could clearly continue in operation under Title VII where allowed by the Equal Pay Act. The Court relied in part for its determination on a ruling of the Department of Labor which implicitly provided that if basic wages

were the same, the fact that an additional benefit was not provided for pregnancy to the only group that could be affected, namely, females, it would not violate the Act. The particular ruling relied upon recognized, as did the Court by implication, that longevity was a "factor" other than sex allowed as an exemption from the Act. The Court stated:

> "When Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . .', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant. . . ." *General Electric, supra* p. 145.

The respondents suggest an approach which would provide for a system having a disparate impact on males either by subsidy of the females or greater pay for the females. If your petitioners' Plan violated Section 703(a)(1) then, surely, this disparate impact would violate Section 703(a)(2) where as here it is a just a subterfuge to discriminate against one sex or the other. The sole purpose would be to favor females.

This Court has already held that federal legislation *favoring* one sex over the other violates equal protection where there is no rational basis therefor. *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Can this Court now hold that it is constitutional for the Court herein but not Congress to favor women? It can only do so if there is a rational basis to *favor* women. *Kahn v. Shevin*, 416 U.S. 351 (1974); *Schlesinger v. Ballard*, 419 U.S. 498 (1975). Such recognition

of a rational basis would be, *a fortiori,* recognition of female longevity as actuarially acceptable.

If recognition of female longevity is thus acceptable, then so is the Plan of your petitioners.

The opponents want the Court to weigh competing interests in favor of the female employees. They suggest that a plan which favors females would not violate the statute because it is permissible to have larger groups covered identically under employee benefit plans. They argue that this is so because it is a normal principle of insurance that one person may lose and another win from the insurance standpoint even though the risk may affect one more than the other because the particular factor affecting that particular person is not taken into account in the group. They suggest that even though that factor is sex as related to longevity, it is allowed under the statutes because it is "neutral", as if such factor could be neutral. On the other hand, they argue that to allow grouping to avoid the impact on the sex with the higher risk factor is discriminating for the purpose of sex, and sex alone. We have difficulty seeing the difference. It appears to us that in either case one is differentiating on the basis of sex.

In terms of groups, clearly the systems suggested by the respondents favor women. They do not provide for neutral treatment, no matter what arguments are made. And, because insurance and annuity risks are not known on an individual basis it would logically seem that they favor each individual female over each individual male.

In terms of groups, the employer plans challenged herein and in similar cases (*Colby, supra; Henderson*

v. Oregon, 405 F.Supp. 1275 (1975) on appeal to the 9th Circuit, *et seq.*) treat risks not neutrally, but equally.

This Court is being asked to hold, in effect, you may not differentiate between men and women but you may discriminate against men. We submit the Court should not make such determination. Accord: *General Electric Co. v. Gilbert* and *Nashville v. Satty.*

Conclusion.

Having conceded the different wage payments are for different pension payments and having conceded the actuarial bases of the Plan, and having raised no contention that the Plan is a subterfuge to discriminate against females, respondents took the position that mere differentiation in contributions is sufficient to violate the Acts. Respondents failed to indicate how such mere differentiation was a violation of the statutes where it was based on sex-differentiated actuarial tables.

Therefore, they and their supporting amici take the position that the Court should hold contrary to the statute by setting a policy that was never set by Congress. They ask the Court to legislate contrary to its Constitutional duty, in the same fashion that the courts below were led to abdicate their responsibilities and so legislate by totally deferring to administrative agency bulletins.

In so doing, respondents also ask this Court to remove from local government and local control, the administration of the City's pension plan, where Congress has chosen not to so do.

We respectfully petition this Court to reverse the decision of the lower courts and direct the District Court to enter judgment for petitioners.

Respectfully submitted,

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APPENDIX.

Employment Testing and Judgments; Judicial Tests and Judgments.

About 1955, professional educators and psychologists published technical recommendations regarding the development of achievement, psychological, and diagnostic tests. In 1966 (following the enactment of the Civil Rights Act) the professional societies jointly published technical recommendations. Earlier recommendations had been an attempt to develop, formulate through a survey or polling method, some consensus of the information which a test user would find helpful. The 1966 recommendations were a reformulation of those recommendations.

The new recommendations were titled "Standards for Educational and Psychological Tests and Manuals" of the American Psychological Association.

The recommendations fully recognized that many tests were then fully developed and would be "released for practical publication without local validation". (Ibid. p. 3) A test manual containing the publisher's report of experiments, studies or "tests of his test" (so to speak) was to supply a basis for intelligent judgment by the test user.

In describing the "Development and Scope of the Standards" the published document explains that "the present effort is concerned with standards of reporting information about tests". (Ibid. p. 1) "[T]he essential principle that sets the tone for this document is that a test manual should carry information *sufficient to enable any qualified user to make sound judgments regarding the usefulness and interpretation of the test*". (Ibid. p. 2) "Tests released for operational use . . .

should be released to the general user only after their developer has gathered information *which would permit the user to know for what use the tests can be trusted.*" (Ibid. p. 4) (Emphasis added).

Thus the major premise of the recommendations was that the publisher should test his professional judgment as to test reliability, validity, interpretation and other matters by certain analyses, studies (perhaps including statistical studies) before releasing the test; that the manual accompanying the test should show the results of the studies actually conducted; and that the test selector and user would then have an evidentiary basis to make informed judgment on such matters in relation to his own situation.

Later the same year (1966) the EEOC published "Guidelines on Employment Testing Procedures". The document consisted of three parts: (1) a general introduction, (2) "The General Guidelines of the Commission", and (3) a "Report by a panel of psychologists".

The first two parts of the document are a statement of what the Commission "advocates" or "recommends" or "encourages". Similarly the report by the panel of psychologists states that the Commission "has asked us to advise it" . . . concerning the process by which tests should be *developed* and administered in an employment setting." (Emphasis added). The report states "we recommend that the Commission *advocate* the use of a total personnel assessment system". One part of such system was said to be a "test", but "interview" etc. were also mentioned.

The Panel's Report contained many headings, but the most significant is "criterion-related validity". Under this heading the report stated that "tests should

be selected on the basis of validation against the performance requirement of the job, that is, criterion-related validity."

Thus this recommendation was in direct conflict with principles of the 1966 professional standards. It recommended a local validation study as the basis for *selection* of a test. In contrast the 1966 professional standards contemplated that tests should be selected and used without such local validation studies. Instead the test manual of the publisher "would permit the user to know for what use the test can be trusted". A.P.A. *Standards, supra*, p. 4.

The 1970 EEOC guidelines on testing, further expanded the matter. While the earlier on document focused on "tests" in the ordinary sense, the later guidelines newly defined "tests" so that it included *every* employment standard and its application: "The term 'test' includes *all* . . . techniques of assessing job suitability including . . . work history requirements, scored interviews . . . etc." 29 C.F.R. §1607.2.

There were other major differences in the new guidelines. For example they purported to require (even though not issued pursuant to the record keeping requirements of the statute) that "each person using tests (and tests are defined as any standard by which judgment is made) . . . shall have available for inspection evidence that the tests are being used in a manner which does not violate" the EEOC's definition of discrimination. 29 C.F.R. §1607.4.

A review of the entire testing guidelines shortly after their publication, evaluated them in the following terms:

> "In sum, the Guidelines appear *designed* to scare employers away from objective standards

which have a differential impact on minority groups because, applied strictly, the testing requirements are *impossible* for many employers to follow." Note "Developments—Title VII", 84 Harv. Law Rev., pp. 1109, 1131. (Emphasis added).

Moving from the employment decision context to the judicial context raises a further set of problems. This set of problems is caused by the totally "experimentalist" assumptions of the guidelines—the notion that *only* an experiment (or statistical study) resulting in statistical evidence of "criterion-related validity" provides a sufficient basis for concluding the standard (or "test") is "valid".

One who formulates or develops a "test" or employment standard — *e.g.*, "tall men are better basketball players than short men" is obliged (if he is a strict experimentalist as the "guidelines" require him to be) to "prove" that standard with a statistical study.

The statistical study begins by assuming that such rational judgment is merely a hypothesis, that it has a "null" validity. This does *not* mean that it is false in fact. It only means that for purpose of the experiment (the statistical study) it must be *assumed* for the sake of the experiment that there is only an absolutely random relationship between "tall men" and "better basketball players." Thus "zero" or "null" or "no" validity is simply a methodological assumption. Morrison and Henkel, *The Significance Test Controversy* (1970, Aldine Publishing Co., Chicago).

Suppose then, in the particular experiment attempted, the taller men and the shorter men do not have a significant difference as measured against the criterion: "better basketball players". Does that prove

the original rational judgment that "tall men are better basketball players" is false?

No, it only means the evidence obtained in the "study" was inconclusive. It is not sufficient to disprove the null hypothesis.

Note that the experiment is itself a test; and the *assumption* that the experiment will be useful is a rational judgment.

However, a trial judge, told in effect that he may not make a rational judgment on the bona fides, the validity, or the rationality of employment standards or decisions *unless* there is statistical evidence showing that the standard is significantly different than random selection, is necessarily forced into making non-rational decisions. This si especially true since under the "total experimentalist" view a statistical correlation is itself not a *rational* relationship, but merely one that "happens" at this time and place, to turn up as non-random.

The necessity for and value of experimental evidence is itself a matter of dispute among psychologists. The "clinicians" and the "experimentalist" schools of psychology hold differing views.

The judicial process, on the other hand, has generally not required any particular *kind* of evidence to prove the truth of any proposition of fact such as reliability and validity of employment standards and decisions. *Almassy v. L.A. County Civ. Serv. Com., supra.*